



January 14, 2002

Ms. Myrna S. Reingold
Galveston County Legal Department
4127 Shearn Moody Plaza
123 Rosenberg
Galveston, Texas 77550-1454

OR2002-0225

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157284.

The Galveston County Medical Examiner's Office (the "medical examiner") received a request for copies of all records as they relate to a specified deceased person. The Galveston County Sheriff's Office (the "sheriff's office") received two requests for copies of all records as they relate to the same person "dating back from December 2000." You state that you have released or anticipate releasing some responsive information to the requestor. You claim that portions of the submitted information maintained by the medical examiner are excepted from disclosure pursuant to section 552.101 of the Government Code. You claim that the remaining portions of the submitted information maintained by the medical examiner may not be subject to compelled disclosure under the Public Information Act (the "Act"). You also claim that the submitted information maintained by the sheriff's office is excepted from disclosure pursuant to sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that the submitted information maintained by the sheriff's office contains a document that is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The public court record that we have marked may only be withheld from disclosure to the extent that it is confidential under "other law." *See id.* You claim that this record is excepted from disclosure pursuant to sections 552.103 and 552.108 of the Government Code. However, sections 552.103 and 552.108 are discretionary exceptions under the Act and, as such, do not constitute "other law" for purposes of section 552.022(a)(17).¹ *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). Consequently, we do not address your section 552.103 and 552.108 claims with regard to this record. However, since you claim that this record is also excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy, we will address this claim.

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by the common-law right to privacy. Information must be withheld from disclosure under section 552.101 in conjunction with the common-law right to privacy when (1) the information is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). When a law enforcement agency compiles criminal history information pertaining to a particular individual, the compiled information takes on a character that implicates the individual's right of privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *see also* Open Records Decision No. 616 at 2-3 (1993). However, since the privacy rights of an individual lapse upon death, we conclude that the sheriff's office may not withhold this public court record from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. *See generally*

¹ Discretionary exceptions are intended to protect only the interests of the governmental body as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

Attorney General Opinion H-917 at 3-4 (1976); *see also* Open Records Decision No. 272 at 1 (1981). Accordingly, the sheriff's office must release the marked public court record to the requestor.

We also note that the submitted information maintained by the sheriff's office contains a custodial death report at Tab A. In Open Records Decision No. 521 at 5 (1989), this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the attorney general, section one of a custodial death report filed with this office is public information, but sections two through five of the report, as well as attachments to the report, are confidential. *See* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Accordingly, the sheriff's office must release section one of the submitted custodial death report at Tab A to the requestor. However, because sections two through five of the report are deemed confidential under article 49.18(b), the sheriff's office must not release the remaining portions of this report to the requestor.

You claim that portions of the submitted information maintained by the medical examiner and the sheriff's office contains medical record information, access to which is governed by the Medical Practice Act (the "MPA"), subtitle B of Title 3 of the Occupations Code.² The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). We have marked the portions of the submitted information maintained by the medical examiner and the sheriff's office that constitute medical records that may only be disclosed in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991), 546 (1990) (finding that because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, the medical examiner and the sheriff's office must withhold this marked information from disclosure pursuant to section 552.101 of the Government Code in conjunction with the MPA.

² We note that the claimed medical record information maintained by the medical examiner appears to have been created by hospital trauma personnel while the deceased person was still alive.

You claim that the remaining portions of the submitted information maintained by the medical examiner may not be subject to compelled disclosure under the Act. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Information is generally "public information" within the scope of the Act when it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* Open Records Decision No. 635 at 4 (1995). You contend that since the remaining submitted information does not constitute information that is part of the medical examiner's autopsy report, it may not constitute "public information" that is within the scope of the Act. We note that although the remaining submitted information is not part of the medical examiner's autopsy report, it is still information that is maintained by the medical examiner in connection with the transaction of his official business. Therefore, the remaining submitted information constitutes information that is subject to the Act. Since you do not claim that any portion of the remaining submitted information maintained by the medical examiner is excepted from disclosure under the Act, we conclude that you must release it to the requestor.

You claim that the remaining submitted information maintained by the sheriff's office is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108(a)(1) provides that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from disclosure "if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the remaining submitted information maintained by the sheriff's office pertains to an active investigation into the death of the specified person and that the release of this information would interfere with the detection, investigation or prosecution of crime. Therefore, we conclude that the release of the remaining submitted information maintained by the sheriff's office would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a); *see also Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. *See* Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per*

curiam, 536 S.W.2d 559 (Tex. 1976). Accordingly, with the exception of basic information that is contained throughout the remaining submitted information maintained by the sheriff's office, we conclude that the sheriff's office may withhold the remaining submitted information from disclosure pursuant to section 552.108(a)(1) of the Government Code. *See* Open Records Decision No. 127 (1976) (summarizing the types of basic information that must be made available to the public).³

In summary, the sheriff's office must release to the requestor the public court record that we have marked to the requestor pursuant to section 552.022(a)(17) of the Government Code. The sheriff's office must release section one of the submitted custodial death report at Tab A to the requestor. The sheriff's office must not release the remaining portions of the submitted custodial death report to the requestor pursuant to article 49.18(b) of the Code of Criminal Procedure. Absent the applicability of an MPA access provision, the medical examiner and the sheriff's office must withhold the medical record information that we have marked from disclosure pursuant to section 552.101 of the Government Code in conjunction with the MPA. The medical examiner must release the remaining submitted information that it maintains to the requestor. With the exception of basic information, the sheriff's office may withhold the remaining submitted information that it maintains from disclosure pursuant to section 552.108 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

³ Because we base our ruling regarding the remaining submitted information maintained by the sheriff's office on section 552.108, we need not consider the applicability of your other claims. We note that "basic information" may not generally be withheld from disclosure under section 552.103 of the Government Code. *See* Open Records Decision Nos. 597 (1991), 362 (1983).

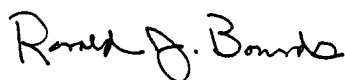
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 157284

Enc. Marked documents

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